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Mr. Eisen

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-200628

DATE: May 19, 1981

MATTER OF: ~~Cybermedic~~

[Protest of Bid Rejection as Nonresponsive]
DIGEST:

1. Protest is untimely where protester received amendment to IFB two days before bid opening and did not file protest based on alleged improprieties in solicitation which were apparent prior to bid opening until after bid opening because protester had reasonable time to file before bid opening. 4 C.F.R. § 20.2(b)(1) (1980).
2. Bidder's failure to acknowledge amendment changing named model in brand name or equal solicitation may be waived if bidder's proposed equipment meets requirements of amended solicitation.
3. Solicitation with brand name or equal purchase description which identifies brand name product but does not list salient characteristics is defective for failure to provide bidders with adequate statement of agency's needs; therefore, unless protester's offered "equal" product differs significantly from brand name product, rejection of bid for failure to meet unspecified feature of brand name product is improper.

Medistor Division of Cybermedic protests the rejection of its bid under IFB 608-19-80 issued by the Veterans Administration Medical Center, Manchester, New Hampshire, for failure to acknowledge an amendment to the solicitation changing the brand name model in the solicitation's brand name or equal description. The protester argues that it was allowed

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inadequate time to respond to the amendment and that the specification change only benefited the brand name manufacturer. Cybermedic also maintains that its original bid meets the requirements of both the original and amended solicitations and that award should have been made to it on its original low bid. For the reasons set forth below the protest is sustained.

The IFB was issued August 25, 1980, with bid opening scheduled for September 22. The VA reports, however, that on September 16, it telephoned each firm which had been sent a copy of the solicitation and advised it of the amendment to the IFB and of an extension of the bid opening date to September 26. Cybermedic states that it has no record of such a telephone call. The amendment changed the requirement from a Clinical Modular Lung Analyzer, Warren E. Collins model 03000, or equal, and three accessory items, to a single item, a Warren E. Collins Maxi Modular Lung Analyzer for Vent Studies, or equal. Also on September 16, the VA sent, via certified mail, notification of the change. Cybermedic acknowledges receiving the written notification on September 24.

When bids were opened on September 26, Cybermedic was the low bidder, but its bid was rejected as non-responsive because of the firm's failure to acknowledge the amendment which included a statement that acknowledgement of its receipt must be made by September 26 and that failure to do so may result in the bid being rejected as nonresponsive. Award was made to the next low bidder, Warren E. Collins, Inc. Cybermedic filed its protest with our Office on September 30.

Cybermedic's allegations that it did not have sufficient time to respond to the amendment and that the amendment benefited only the brand name manufacturer are untimely and will not be considered. To be timely, a protest must be filed before bid opening if it is based, as these contentions are, on alleged

improprieties in the solicitation which are apparent prior to bid opening. 4 C.F.R. § 20.2(b)(1) (1980). Even assuming that the protester was not orally informed of the amendment on September 16, as it alleges, Cybermedic received the amendment on September 24, but still did not file its protest until three days after bid opening. Under these circumstances where the protester had a reasonable opportunity (2 days) to file its protest before bid opening, its failure to do so makes this portion of the protest untimely. Cf. Culligan, Inc., 58 Comp. Gen. 307, 308 (1979), 79-1 CPD 149. That the protester's president may have been out of town when the amendment was received, as alleged, does not affect this result. The major basis for protest is timely, however, as it specifically concerns the validity of VA's rejection of the protester's bid and was filed within 10 days of the rejection of Cybermedic's bid. See 4 C.F.R. § 20.2(b)(2).

Cybermedic contends that it did not have to respond to the amendment because its original bid which offered its Medistor III model satisfies all of the requirements of the amended solicitation as well as the original requirements.

The failure to acknowledge an amendment usually renders a bid nonresponsive. Porter Contracting Company, 55 Comp. Gen. 615 (1976), 76-1 CPD 2. Nevertheless, acknowledgement of an amendment can be waived if the amendment clearly would have no effect or only a trivial effect on price, quality, quantity, or the relative standing of the bidders. See Fil-Coil Company, Inc., B-197604, March 25, 1980, 80-1 CPD 221. The basis of the rule is that acceptance of a bid which disregards a material provision or requirement of an invitation, as amended, would be prejudicial to the other bidders. Clarification of the bid after opening is not permitted because the bidder in such circumstances would have the option to decide to become eligible by furnishing extraneous evidence that the amendment had been considered or to avoid award by remaining silent. Fil-Coil Company, Inc., supra.

In this instance, however, if Cybermedic is correct in its contention that the equipment offered in its original bid is the equivalent of the brand name items listed in both the original solicitation and the amended solicitation, there would be no need for the protester to acknowledge receipt of the amendment. The failure to acknowledge the amendment would not prejudice other bidders as the protester would be bound by its original bid to furnish the equipment it specified and, if that equipment meets the requirements of the amended solicitation, the protester would be satisfying the Government's needs and bidding on the same overall basis as its competitors.

The problem in this case is that we cannot determine whether the protester's equipment is equal to the brand name product. The VA merely maintains that the equipment offered by Cybermedic does not meet the requirements of the amended solicitation; it does not specify any basis for this position. Moreover, the brand name or equal descriptions in both the original and amended solicitations do not list the salient characteristics the equipment must meet to be acceptable, so that there does not appear to be any reasonable basis to make the determination.

In a brand name or equal procurement, an agency has an obligation to inform bidders of the salient characteristics of the brand name product essential to the Government. See Federal Procurement Regulations § 1-1.307-4. Firms cannot compete on an equal basis when the solicitation merely lists brand name items which meet the agency's requirements but does not list the item's salient characteristics; bidders are left to guess which features of the brand name equipment the contracting agency considers necessary to

meet its minimum needs. M/RAD Corporation, B-199830,
February 27, 1981, 81-1 CPD 138; Dictaphone Corporation,
B-196512, September 17, 1980, 80-2 CPD 201.

It may be that what the protester offered is so significantly different from the brand name product that VA properly could reject the bid. Unless this is the situation, we believe the absence from the solicitation of salient characteristics would preclude rejection of the protester's bid for noncompliance with some performance or design feature since the protester was never placed on notice of the essentiality of such a feature. Consequently, unless the VA can justify rejection of the protester's bid because its offered product is significantly different from the brand name item, we believe the VA should terminate the existing contract for the convenience of the Government and recompetite its requirement under a proper purchase description, and we are so recommending.

The protest is sustained.


Acting Comptroller General
of the United States